

SOLOMON E. GRESEN [SBN: 164783]
STEVEN V. RHEUBAN [SBN: 48538]
LAW OFFICES OF RHEUBAN & GRESEN
15910 VENTURA BOULEVARD, SUITE 1610
ENCINO, CALIFORNIA 91436
TELEPHONE: (818) 815-2727
FACSIMILE: (818) 815-2737

Attorneys for Plaintiffs Omar Rodriguez, Steve Karagiosian,
Cindy Guillen-Gomez, Elfego Rodriguez and Jamal Childs

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL DISTRICT

OMAR RODRIGUEZ; CINDY GUILLEN-
GOMEZ; STEVE KARAGIOSIAN;
ELFEGO RODRIGUEZ; AND JAMAL
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY
OF BURBANK; TIM STEHR; KERRY
SCHILF; JAMIE "J.J." PUGLISI; DAN
YADON; KELLY FRANK; PAT LYNCH;
MIKE PARRINELLO; AARON KENDRICK;
DARIN RYBURN; AND DOES 1 THROUGH
100, INCLUSIVE.

Defendants.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge

**PLAINTIFF'S REPLY BRIEF IN SUPPORT
OF MOTION FOR RETURN OF
INADVERTENTLY DISCLOSED
DOCUMENTS**

Complaint Filed: May 28, 2009

INTRODUCTION

Last Friday, January 8, 2010, pursuant to the December 30, 2009, "2nd Report of the
Discovery Referee," the parties filed their briefs regarding the motion of Plaintiff Omar Rodriguez
for the return of an inadvertently-disclosed confidential, attorney-client privileged, 44-page
document (the "Document") that he prepared at the request of his attorney, Solomon Gresen.

1 Plaintiff submits this Reply the sole purpose of advising the Discovery Referee of the holding
2 in Kern Construction Co. v. Superior Court (Southern California Gas Co.) (1968) 266 Cal.App.2d
3 405, which Defendant incorrectly cited in its brief.

4 ARGUMENT

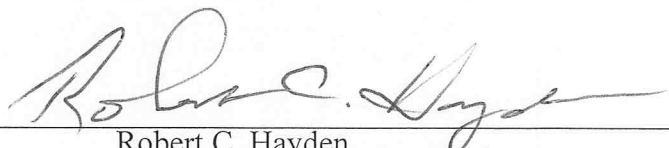
5 One of Defendant's arguments against returning the Document is that Plaintiff waived the
6 attorney-client privilege by reviewing the Document to refresh his recollection prior to his
7 deposition. However, there was no resulting waiver, as Plaintiff demonstrated in his brief, citing
8 8 Weil & Brown, Civil Procedure Before Trial (Rutter 2009) § 8:724.3.

9 Defendant's January 8 letter brief (at p.4), cites Kern Construction, erroneously asserting,
10 "[T]he Court held that California Evidence Code § 771 trumps the attorney-client privilege when a
11 document is used to refresh memory to testify."

12 That is not what Kern Construction holds. The court found a waiver of the privilege
13 because, "[h]aving no independent memory from which he could answer the questions" (Id. at 410),
14 **the witness testified based on the contents of the document rather than based on his**
15 **recollection.** The document did not refresh the witness's recollection. 8 Weil & Brown, Civil
16 Procedure Before Trial (Rutter 2009) § 8:724.3, citing the Kern Construction case, states, "If the
17 client claims *no present memory* of the events recorded in a statement given to his or her attorney,
18 *and uses that statement in order to testify*, it would be 'unconscionable' to prevent the adverse party
19 *from seeing it. Any privilege is waived.*" **Unlike the witness in Kern Construction, Plaintiff did**
20 **not use the Document in order to testify. He merely used it to refresh his recollection.**
21 **Accordingly, he did not waive the attorney-client privilege.**

22
23 Dated: February 22, 2010

LAW OFFICES OF RHEUBAN & GRESEN

24
25 By: 
26 Robert C. Hayden
27 Attorneys For Plaintiffs Omar Rodriguez, Steve Karagiosian,
28 Cindy Guillen-Gomez, Elfego Rodriguez and Jamal Childs

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles. I am over the age of eighteen and am not a party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino, California 91436.

On February 22, 2010, I served a copy of the following document described as
**PLAINTIFF'S BRIEF IN SUPPORT OF MOTION FOR RETURN OF INADVERTENTLY
DISCLOSED DOCUMENTS** on the interested parties in this action as follows:

Lawrence A. Michaels
Mitchell Silberberg & Knupp LLP
11377 West Olympic Boulevard
Los Angeles, CA 90064-1683
Facsimile: (310) 312-3100
Email: LAM@msk.com

Linda Miller Savitt, Esq.
Ballard Rosenberg Golper & Savitt, LLP
500 North Brand Boulevard, Twentieth Floor
Glendale, California 91203
Facsimile: (818) 506-4827
Email: lsavitt@brgslaw.com

Carol Ann Humiston
Senior Assistant City Attorney
Office of the City Attorney
275 East Olive Avenue,
Burbank, California 91510-6459
Facsimile: (818) 238-5724
Email: chumiston@ci.burbank.ca.us

XX **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am "readily familiar" with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. mail Postal Service in Los Angeles, California, in a sealed envelope with postage fully prepaid.

— **BY FACSIMILE:** Based on an agreement of the parties to accept service by facsimile transmission, I faxed the documents to the person(s) at the facsimile numbers listed above. The telephone number of the sending facsimile machine is (818) 815-2737. The sending facsimile machine issued a transmission report confirming that the transmission was complete and without error. A copy of that report showing the time of service is attached.

XX **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address listed above. My electronic notification address is dj@rglawyers.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A copy of the electronic transmission showing the time of service is attached.

XX **STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED on February 22, 2010, at Encino, California.

Daphne Johnson